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LIABILITY WITHOUT FAULT *

"I AM satisfied that *Rylands* v. *Fletcher* is not limited to the case of adjacent freeholders. I shall not attempt to show how far it extends. It extends as far as this case, and that is enough for the present purpose." So Lord Sumner,[1] using the method of inclusion and exclusion by which the common law "broadens down from precedent to precedent." That method has its conveniences for the judiciary. Other students of the law, however, cannot so easily avoid the question how far *Rylands* v. *Fletcher* extends; and the question is a profitable one, for there has been too little consideration of the scope or utility of the doctrine for which that famous case stands as compared with the discussion of its theoretical merits. On this latter point there has been abundant controversy for a generation or more, with the apparent assumption on both sides that it involved a difference of serious importance in its practical aspects as well as in legal theory. The soundness of this assump-

* NOTE. — Dean Thayer left three drafts of this article among his papers, together with a great mass of manuscript materials for notes. From his manuscript alterations upon what appears to have been the last draft it has been possible in almost every case to determine what he intended as the final form. In one or two instances of no great importance the text has been fixed on the balance of probability as between different drafts. Unfortunately it has proved impossible to work out the elaborate notes which were to have illustrated and reinforced the text. A few that appear to be complete are given as he left them. For the rest, reference to the cases cited and quoted from is as much as the state of the manuscript warrants.

[1] Charing Cross & City Electricity Supply Co. *v.* London Hydraulic Power Co., [1914] 3 K. B. 772, 779.

tion ought to be examined. Even if we have not yet reached the time to which Mr. Justice Holmes looks forward, "when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them,"[2] it is none the less important in estimating the legal value of a doctrine to consider whether its results have been misunderstood and its practical significance exaggerated.

What, then, is the doctrine of *Rylands* v. *Fletcher?* The first thought suggested by the familiar name is that of absolute liability imposed upon a landowner who collects certain things on his land — a duty of insurance against harm caused by their escape regardless of the owner's fault. A duty of this sort to insure against consequences, remote as well as proximate,[3] attaching to the original act of bringing into existence the conditions which eventually do the harm, would no doubt be a matter of serious concern practically as well as theoretically. It would not lack legal analogies; witness the case of him who unlawfully creates a dangerous condition (in ordinary legal parlance a "nuisance"), or the lawful keeper of a savage animal; and although some of these analogies have an archaic flavor, and the ideas in *Rylands* v. *Fletcher* have been criticized as a survival from a time when the English law had as yet "no well-defined test of an actionable tort,"[4] it is a point of view toward which modern legal thought is turning.[5] This reversion of recent legislation to ancient conceptions has been clearly pointed out by Judge Smith in his able discussion of the Workmen's Compensation Act.[6] A community which accepts the principle of such an act cannot be expected to find anything intrinsically unreasonable in the doctrine which seeks to throw upon the undertaker the full responsibility for harm arising from his enterprise, on the theory

[2] "The Path of the Law," 10 HARV. L. REV. 457, 474.

[3] The conception is perhaps that the person who sets in motion an uncontrollable or dangerous agency — an agent, a wild animal, ponded water, a business (under the Workmen's Compensation Acts), a dangerous condition of premises — is held responsible for what is proximately caused by the agency rather than proximately by himself; that is, if the agency is a proximate cause of the injury, the person responsible for the agency is liable though a remote cause of the injury.

[4] Doe, J., in Brown *v.* Collins, 53 N. H. 442, 445.

[5] See Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195, 233.

[6] "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235.

that the business should bear its losses in the first instance regardless of fault or proximate cause, and that ultimately, like any other overhead charge, they would fall on the consumer. But despite frequent misunderstandings, this is just what *Rylands* v. *Fletcher* does *not* do. There is a good deal in the original judgments which looks in that direction. The much-quoted judgment of Blackburn, J., in the Exchequer Chamber shows doubt whether even the act of God would excuse the owner; and Lord Cranworth goes to great lengths.[7] Moreover, the English judges have shown a disposition at every stage to treat the liability of the owners of savage animals as a parallel case;[8] and since *Baker* v. *Snell*[9] it is doubtful indeed what escape from liability (excepting the fault of the victim) is left to him who indulges in the dangerous luxury of such ownership. But whatever the thought of the judges who decided the case, and wherever analogy might have been expected to lead, it was soon settled that *Rylands* v. *Fletcher* was to stand for no such doctrine of insurance against remote consequences. Not only was it limited to owners whose acts were for their individual purposes, excluding arrangements for the joint benefit of the plaintiff and the defendant, and excluding also undertakings of a public nature, but the defendant could set up in excuse that the escape was caused by the act of God, or by the act of a third party, or even, it would seem, by rats if their operations had been so skillfully conducted as to acquit the defendant of accessory negligence. This last point indeed was not decided, for *Carstairs* v. *Taylor*[10] went off on another ground;

[7] "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape." Blackburn, J., in Fletcher *v.* Rylands, L. R. 1 Ex. 265, 279 (1866).

"My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." Lord Cranworth in same case, L. R. 3 H. L. 330, 340 (1868).

[8] "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable." Bramwell, B., in Nichols *v.* Marsland, L. R. 10 Ex. 255, 260 (1875).

[9] [1908] 2 K. B. 352, 825.

[10] L. R. 6 Ex. 217 (1871).

but it seems to be fairly involved in *Nichols* v. *Marsland* [11] and *Box* v. *Jubb*.[12] For upon what can those cases rest except the abandonment of any idea of insurance against remote consequences? Elementary principles of the law of negligence would fix liability upon the defendant for an escape, whether caused by an act of nature, or of a third person, if by due care he would have foreseen and avoided it; and these decisions can mean in reason nothing less than this — that where an escape is caused by the direct interposition either of an act of man or a natural force, the defendant is excused in any case where he would not be liable on ordinary principles of negligence. In other words, in such a case *Rylands* v. *Fletcher* can be invoked only when it is unnecessary to invoke it.

If this is true alike of the forces of nature and human intervention, it is not apparent in reason why there should be a special doctrine for harm caused by other members of the animal kingdom. And, however this may be, Sir Frederick Pollock's comment is apt:

"In every case of the kind which has been reported since *Rylands* v. *Fletcher*, that is, during the last 25 years, there has been a manifest inclination to discover something in the facts which took the case out of the rule. According to the English judicial system which has gone round the world with the English language and English or Anglicized institutions, the decisions of superior courts are not merely instructive and worthy of regard, but of binding authority in subsequent cases of the like sort. But there are some authorities which are followed and developed in the spirit, which become the starting-point of new chapters of the law; there are others that are followed only in the letter, and become slowly but surely choked and crippled by exceptions." [13]

The territory within which the doctrine of *Rylands* v. *Fletcher* may operate is thus bounded on one side by that in which the defendant is excused by the intervention of some new agency which could not be foreseen, and, on the other, by that in which, even if *Rylands* v. *Fletcher* were altogether repudiated, the defendant would be held by the ordinary principles of negligence. Between these limits is left only the field where the thing which the defendant has collected escapes by its own force acting on existing conditions

[11] L. R. 10. Ex. 255 (1875).

[12] 4 Ex. Div. 76 (1879).

[13] THE LAW OF FRAUD IN BRITISH INDIA, 53.

without negligence of the defendant. Such an intermediate ground no doubt exists; but it is a little space. How narrow it is can hardly be realized until the full scope of the modern law of negligence is recognized. That law is very modern — so modern that even the great judges who sat in *Rylands* v. *Fletcher* can have had but an imperfect sense of its reach and power. In its modern development the emphasis which the conception of due care *according to the circumstances* throws on the special facts of the case, with the right and duty of the jury to take into account every consideration which should have come into the defendant's calculations, so justifies and encourages the natural human proclivity to argue *post hoc propter hoc* that as practical a matter a defendant must have been a very prudent man indeed to escape the suggestion — *i. e.*, a suggestion proper to go to the jury — that in the light of the facts before him he should have thought of this or that danger and provided against it. And if the theory of negligence is sufficient to carry the case to the jury, the plaintiff's remaining difficulties — again looking at the matter in its practical aspect — are not likely to be very serious in a case of this class.

How powerful a weapon the modern law of negligence places in the hands of the injured person, and how little its full scope has been realized until recently, is well shown by the law of carrier and passenger. The futility of degrees of care in general has long been recognized; but in the case of public service companies the habit of talking as if the carrier owed some special degree of care other than that of the ordinary prudent man has persisted and is common to-day. Clear-headed judges, however, have pointed out that the distinction is illusory. The ordinary prudent man would never take human beings into his keeping under conditions where they trusted utterly in him, and where life and limb was the stake, without qualifying himself in advance in all practicable ways for so dangerous a business and without using all available precautions in carrying it on. In such a business the highest care is thus nothing more than ordinary care under the circumstances; and it may be conjectured that in the case of carrier and passenger there is little difference, as a practical matter, between the results reached by the law of negligence and the doctrine of *Rylands* v. *Fletcher*. Few cases are likely to arise in which a railroad company would escape to-day, except where the accident was caused by the unforeseeable

intervention of some natural force or human being. Yet those are the very things which excuse him also under *Rylands* v. *Fletcher*.

This stringent liability of the carrier is not due to his public calling, but to the nature of the agencies he uses, the helplessness of the passengers, and the peril to life and limb. If these conditions are the same, the carrier's liability is no less stringent even where he is not technically a common carrier (the proprietor of a sightseeing automobile, for example).[14] And in these respects the parallel between the carrier and the defendant in a case like *Rylands* v. *Fletcher* is close. In each case the defendant has chosen to create a condition dangerous to others unless kept in control. In each the plaintiff has no means of protecting himself and is left helpless and forced to look to the defendant for protection. In the one case as in the other the argument is overwhelming that ordinary prudence requires the defendant not only to take every precaution to inform himself of the dangers of his enterprise before undertaking it, and to guard against such dangers in construction, but also to use unremitting diligence in maintenance and inspection. And so great are the resources of modern science that an accident occurring without the intervention of a new unforeseeable agency will make a hard case for the defendant. There may, of course, be facts which will entitle him to prevail, but they are most unlikely. It will be a strange case where the accident was due to conditions existing when the defendant did the responsible act, or where new forces operated which should have been foreseen, and yet the defendant was free from blame in failing to guard against them. A proper study of the plaintiff's case with expert assistance will be likely to disclose the elements of liability under the modern law of negligence in the vast majority of cases where, assuming the rule in *Rylands* v. *Fletcher*, the defendant would not be excused in view of *Nichols* v. *Marsland* and *Box* v. *Jubb*.

It may be objected that without *Rylands* v. *Fletcher* the plaintiff will suffer from lack of evidence; the means of proving the defendant's negligence lying within the latter's control and beyond plaintiff's reach. But here, as so often, the arsenal of the common law, if explored with an understanding eye, discloses powerful and sufficient weapons to deal with an apparent injustice. The difficulty is

[14] Hinds *v.* Steere, 209 Mass. 442, 95 N. E. 844 (1911).

met by the doctrine of *res ipsa loquitur*. It is, indeed, the very situation for which that doctrine exists. *Res ipsa loquitur* is often dealt with as if it designated something peculiar with a tinge of mystery about it — a notion to which the Latin phrase perhaps lends color. The thought is suggested of the possible significance of a single isolated fact — as if any fact were ever presented *in vacuo*. In reality nothing could be simpler or have less flavor of mystery or technicality than the principles to which the phrase points, principles which, rightly understood, raise no difficulty whatever in their application except the inevitable and eternal difficulties incidental to any close question of fact. The phrase is nothing but a picturesque way of describing a balance of probability on a question of fact on which little evidence either way has been presented. We speak as if it were the mere fact that an accident has occurred. But it is never limited to that. Some evidence (more or less, as the case may be) of surrounding circumstances is always added; and a great body of additional evidence, which never needed to be introduced, the tribunal always has with it in the shape of its common knowledge. As soon as the plaintiff rests and his case is closed the question must arise whether he is entitled to go to the jury — in other words, whether a reasonable tribunal would be justified in saying that he has proved his case, that is, has made the facts which entitle him to recover definitely more probable than all other states of fact. If his evidence, taken at its best, justifies this view, then, and then only, it speaks of liability. It is manifestly all a matter of reasonable probabilities according to the common experience of mankind. The idleness of any talk of "certainty" has been long since exposed, and "legal certainty" is a mere phrase. In passing on such a question the opportunities of the parties to get at the facts must obviously be considered, for the conduct of a plaintiff in stopping short with a meager case will have a very different aspect according as he has or has not the means of proving more. In a case of the *Rylands* v. *Fletcher* type the plaintiff should have no difficulty in proving his harm, the fact that it was caused by the escape of the dangerous agency, and (if it were deemed necessary) the absence of any convulsion of nature which might serve to excuse the defendant as *vis major*. Such evidence should be sufficient to satisfy the demands of *res ipsa loquitur*, and the defendant is thus forced to expose to the plaintiff the evidence explaining the escape, or, as a practical matter, to submit to a verdict.

If then the two rules of law, namely, the doctrine of *Rylands* v. *Fletcher* and the rules prevailing where that case is rejected and the defendant's liability depends on negligence, be compared in their practical result, the difference between the two in the actual protection given by the law to the injured person is not very great. But the matter does not stop here. Even in the narrow domain left to *Rylands* v. *Fletcher*, namely, the territory in which the plaintiff could recover under that case but not according to the law of negligence, we find another doctrine competing with *Rylands* v. *Fletcher*, and going far to accomplish the same result by a different method. The search for an actual case requiring any such doctrine as *Rylands* v. *Fletcher*, none too easy for the reasons above indicated, is thus made all the harder. At least it must extend farther than the facts of that historic case itself, for the circumstance that the escape of the water was due to the negligence of the contractor employed by the defendant would have entitled the plaintiff to recover in many, if not all of the jurisdictions which reject *Rylands* v. *Fletcher*, regardless of his care in selecting the contractor. This doctrine by which a defendant who has employed an independent contractor may be liable for the consequences of the contractor's negligence, though himself free from fault either in selecting the contractor or in any other particular, is sometimes misleadingly stated as if *respondeat superior* were somehow involved.[15] To say that the contractor is treated as the owner's servant is merely to misstate the situation; it is negatived by the very proposition that he is an independent contractor. The true statement of the case is that the law charges the defendant with a non-delegable duty. Though it be only a duty of care, it is his duty to see that care be used, whatever the agency which he employs to do the work. Sometimes this result follows naturally from the circumstances creating the duty, as where it is attached to some right or privilege the giver of which looked to the defendant's personal responsibility. In

[15] "Where the thing committed to an independent contractor to do for the occupier, on or about his premises, is of itself inherently dangerous, such contractor is the mere instrument or agent of the occupier, so far as concerns the responsibility to those lawfully coming within such danger. In the present case, the responsibility of the defendant, as occupier, is the same as if the window cleaner, who fell from the window sill, had been the ordinary servant of the defendant. He was bound in either case to use the care requisite to see that the work of cleaning his windows was not made unreasonably dangerous to one passing on the sidewalk." Gray, J., in Doll *v.* Ribetti, 203 Fed. Rep. 593, 596 (1913).

other cases the non-delegable quality of the duty is a familiar feature of certain special relations, as, for example, the master's duty to supply proper facilities to his servant. But the matter does not stop with these instances of a *delectus personae* or a consensual relation. There is another class of cases in which it is laid down that "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else — whether it be the contractor employed to do the work from which the danger arises or some independent person — to do what is necessary to prevent the act he has ordered to be done from becoming wrongful." [16] Here we have what is a mere duty of care and yet a non-delegable duty, and what makes it non-delegable is nothing but the character of the enterprise lawfully undertaken by the defendant. The logic of those courts which rejected *Rylands* v. *Fletcher* on the ground that fault was essential to liability might seem equally to condemn a doctrine which results in holding responsible a defendant whose conduct has been lawful and free from negligence at every stage of the transaction. But when even the most uncompromising of these courts are found to accept this doctrine, sometimes after delay and reluctance, a presumption of usefulness and adaptation to social ends arises from the very vitality of the doctrine. It has, after all, respectable common law analogies behind it; for he who makes permanent works of dangerous possibilities forces upon his neighbors a relation to which, though it is not consensual, the law must nevertheless attach appropriate duties. To follow the analogy of relations of a different nature and fix him with a non-delegable duty of care to guard against danger has the practical advantage of being conveniently workable, of supplying a spur to effective care in the choice of contractors, and in pointing the victim to a defendant who is easily discoverable and probably financially responsible — features which suggest some of the considerations which have at least helped to keep *respondeat superior* alive.

The existence of such a doctrine imposing a non-delegable duty of care where work, lawful but dangerous, is undertaken, may be

[16] Cockburn, C. J., in Bower *v.* Peate, 1 Q. B. D. 321, 326 (1876).

clearly recognized, though its outline is curiously indistinct. It is perhaps most commonly applied to damage caused by structures on the defendant's land. But there is nothing in reason or in the ordinary statement of the rule so to limit it, and since even *Rylands* v. *Fletcher* is not limited to adjoining landowners, no basis for any such arbitrary limitation appears in this instance. But it is no easy matter to draw the line. Many things there must be which can be intrusted to contractors without liability when the employer is free from personal blame. How are they to be discriminated from those where he cannot relieve himself of responsibility? The difficulties of this question are not relieved by some statements from high authority. There is, for example, an often-quoted passage in Chief Justice Cockburn's judgment in *Bower* v. *Peate* asserting "an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." [17] But is there anything obvious about this difference except the antithesis between a negative and a positive form of stating an identical proposition, helped out by some color in the phrasing? All work to which a duty of care attaches is dangerous work, *i. e.*, work which threatens some injury to others unless care is taken. If the ordinary prudent man would foresee no danger there is no reason to use care. In every case where the question of negligence arises, therefore, it may truly be put either way — that if the doer acts properly, injury will not occur, or that injury will be done unless care is taken to prevent. It is hard to see what is behind this asserted distinction except a difference in the degree of danger; and the same thought may be detected in the frequent statement that the employer is not liable if the negligence of the contractor is merely "collateral." So far as that most conveniently question-begging adjective points to a definite conception, it seems to indicate a distinction according to the definiteness of the danger inherent and visible in the nature of the undertaking. In any such matter as this any statement as to the future is all a matter of probabilities; even if Chief Justice Cockburn's statement has been strengthened, as is sometimes done, by limiting it to a case where harm would "necessarily" arise in the absence of precaution, this,

[17] 1 Q. B. D. 321, 326–27.

on a true analysis, would not mean certainty in any other sense than a high degree of probability. The line, then, can only depend on the degree of danger; the feature which makes the duty non-delegable when there is no *delectus personae*, and the parties have come into no consensual relation, and the plaintiff has nothing to stand on except his rights as a fellow being threatened by the defendant's undertaking, must be the extra-hazardous character of that undertaking. The very nature of such a discrimination involves difficulties and fluctuations of individual opinion in its application; the comparison of instances is likely to produce somewhat bewildering results, suggesting that the maintenance of a lamp overhanging the street or washing the windows of an office building involves greater hazards than the ownership of a motor car or the transportation of dynamite. It may well be doubted whether the doctrine is worth the price represented by such uncertainties; whether the law of negligence with its requirement of personal fault should not be left to take care of all cases in which the duty is not made non-delegable as a necessary consequence of the special relation of the parties, and whether, for reasons already indicated, it is not quite sufficient to take care of them.

But assuming that such a doctrine is to be accepted — and it seems to have taken a pretty firm root — its incompatibility with *Rylands* v. *Fletcher* is striking. Both doctrines depend on the extra-hazardous character of the undertaking; the field for any such doctrine is narrow at the best; the line between the danger which calls for care and the "extra" hazard is hard enough to draw; and to magnify this difficulty by bringing in two degrees of "extra" hazard is to introduce needless vexation which makes the old discredited degrees of negligence almost look legally respectable by contrast.

This, however, is the point to which courts which have accepted *Rylands* v. *Fletcher* have found themselves driven without escape. They must subdivide undertakings into at least four classes. (1) A first class would be those which are unlawful, so that creating the condition results in what ordinary legal parlance would designate a "nuisance." Here the defendant's act may be in unlawfully furnishing the material for the catastrophe, even though it is produced by causes which make his act in creating or maintaining the condition remote — for example, gunpowder unlawfully stored

and exploded by lightning or a stranger. (2) A second class would be lawful undertakings so hazardous as to make the defendant liable without fault of anybody, provided no new intervening force produced the result (*i. e.*, *Rylands* v. *Fletcher*). (3) In a third class would be lawful undertakings less hazardous than this last, where liability is excluded unless there has been fault in someone, but still so hazardous as to make the duty of care non-delegable, so that a defendant who is without personal blame may still be held responsible. (4) Lastly, there would be undertakings which involve a duty of care, but for which the defendant cannot be held without fault of his own or his servant's. This situation has been recognized by the Supreme Judicial Court of Massachusetts, which, speaking through one of its ablest members, has defined the second and third classes as follows:

"This rule is rightly applicable only to such unusual and extraordinary uses of property in reference to the benefits to be derived from the use and the dangers or losses to which others are exposed, as should not be permitted except at the sole risk of the user. The standard of duty established by the courts in these cases is that every owner shall refrain from these unwarrantable and extremely dangerous uses of property unless he provides safeguards whose perfection he guarantees. . . . The principle applicable to the erection of common buildings whose fall might do damage to persons or property on the adjacent premises holds owners to a less strict duty. This principle is that where a certain lawful use of property will bring to pass wrongful consequences from the condition in which the property is put, if these are not guarded against, an owner who makes such a use is bound at his peril to see that proper care is taken in every particular to prevent the wrong. . . . The duty which the law imposes upon an owner of real estate in such a case, is to make the conditions safe so far as it can be done by the exercise of ordinary care on the part of all those engaged in the work. He is responsible for the negligence of independent contractors as well as for that of his servants. This rule is applicable to every one who builds an ordinary wall which is liable to do serious injury by falling outside of his own premises. . . . The uses of property governed by this rule are those that bring new conditions which involve risks to the persons or property of others, but which are ordinary and usual and in a sense natural, as incident to the ownership of the land. The rule first referred to applies to unusual and extraordinary uses which are so fraught with peril to others that the owner should not be permitted to adopt them for his own purposes with-

out absolutely protecting his neighbors from injury or loss by reason of the use." [18]

In thus differentiating from one another the two intermediate situations of the four above referred to, the court seems at times to use an emphasis which brings the second near to the first, and the third to the fourth — as if *Rylands* v. *Fletcher* scarcely applied, unless the use of the defendant's property were so unreasonable that it might almost be classed as a nuisance, and as if the rule of non-delegable duties applied to all building operations. But this cannot have been the meaning of the court, as there are undoubtedly cases — the ordinary external repair of a chimney, for example — to which no such rule applies.[19]

On this general subject of the relation of liability to fault — the attempt at method in solving the problem of adequate protection to the plaintiff without injustice to the defendant — the confusion of our law by no means stops at the instances above referred to. Rules coming down in tattered fragments from a time when, to quote Chief Justice Doe once more, "there seems to have been no well-defined test of an actionable tort" — "precedents, established upon superficial, crude, and undigested notions; but no application of the general system of legal reason to this subject" [20] — leave the law in an inexcusably cluttered and unsystematic condition. The carrier of passengers, for example, is liable on one basis; the carrier of goods on another. The latter is an insurer, and he is not; he is liable without fault or proximate causation if the harm is done by a third party and not if by a vice of the goods by an unforeseeable act of nature, so that if robbers derail the train he is liable for goods which they steal, but not for those which perish through the delay, though all be without the carrier's fault. It is perfectly lawful to keep a savage animal, to say nothing of a cow; yet in the one case, as in the other, the owner finds himself burdened with liabilities imposed without reference either to fault or causation, binding him to pay for the consequences of the acts of others for all the world as if the original keeping were an unlawful act.

Some of these instances may work well, however they arose, to

[18] Knowlton, J., in Ainsworth *v.* Lakin, 180 Mass. 397, 399–401, 62 N. E. 746, 747 (1902).

[19] See also Davis *v.* Whiting, 201 Mass. 91, 87 N. E. 199 (1909).

[20] Brown *v.* Collins, 53 N. H. 442, 445.

serve the ends of justice; and no doubt the notion of perfect symmetry is a pedant's dream. And yet, after making all allowance for precedent and practical confusion alike, such a result as *Rylands* v. *Fletcher* produces in our system is not tolerable, and those courts have done well who have flatly refused to have anything to do with it. The subject is one where too much weight should not be given to history, for the law of negligence in its present development is a very modern affair, rendering obsolete much that went before it. And at the present time a social interest of high importance requires that this subject be dealt with by the application of broad and simple general conceptions.[21] This is a period of legislation, when it is alike inevitable and desirable that industry be subjected to detailed regulations of many kinds. Some of these, like the Workmen's Compensation Act, will be general in their application; others will deal in detail with special situations. The imposition of liability without fault will be a constant characteristic of such legislation. The apparent tendency in this respect to recur to earlier conceptions has been ably pointed out by Judge Smith.[22] It is desirable that this should be so; for in civil, no less than in criminal relations, the need of proving fault may for practical reasons defeat the just purpose of the legislation. What cases call for such treatment will be a question of the nicest sort for the legislator, often admitting of no general answer, but depending on all sorts of considerations affecting the particular industry. He has a difficult structure to build; and it is idle to hope that it can be well built on a shifting foundation. That, however, is just what the courts supply to him unless the courts recognize some intelligible and practically workable theory as the basis of liability. A state of the law which leaves it indefinitely difficult to say in advance whether its

[21] "Lord Mansfield, speaking many years ago against subtleties and refinements being introduced into our law, said they were encroachments upon common sense, and mankind would not fail to regret them. It is time, he says, these should be got rid of: no additions should be made to them: our jurisprudence should be bottomed on plain broad principles, such as, not only Judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided upon by them can understand. If our rules are to be encumbered with all the exceptions which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of justice to every case, and not to proceed to more fixed rules." Best, C. J., in Strother *v.* Barr, 5 Bingham 136, 153 (1828). Compare also the remarks of Professor Ballantine, "Qualified Martial Law," 14 MICH. L. REV. 102, 103.

[22] "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235, 344, 368.

rules will or will not hold the defendant responsible for harm which has resulted from his undertaking without his personal tort leaves the legislator in unreasonable doubt as to the material on which he is to work; and such a condition is the less excusable when the law has at its hands in the modern law of negligence the means of satisfying in the vast majority of cases the very needs which more eccentric doctrines are invoked to meet. One who is little disposed to adopt the view that the power of the legislature in this matter is taken away by the constitution may yet so far agree with the Court of Appeals of New York in *Ives* v. *South Buffalo Ry. Co.*[23] as to the fundamental proposition of the common law which links liability to fault.

Ezra Ripley Thayer.

[23] 201 N. Y. 271, 293.